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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

THOMAS F. WEST and DIANA M.
WEST,

Plaintiffs,

v.

BANK OF AMERCA, N.A., et al.,

Defendants.

2:10-CV-1966 JCM (GWF)

ORDER

Presently before the court is defendants Bank of America Loans Servicing, LP, Bank of America Home Loans, Bank of America NA, and Mortgage Electronic Registration Systems' motion to dismiss. (Doc. #4). Plaintiffs Thomas F. West and Diana M. West filed a *pro se* opposition and request for dismissal of motion. (Doc. #11).

Also before the court is defendants' motion to dismiss plaintiffs' amended complaint. (Doc. #14). Plaintiffs filed an opposition and a request for dismissal of defendants' motion (doc. #18 and #19), and defendants filed a reply (doc. #20). Plaintiffs filed an opposition to defendants' reply and a request for dismissal of defendants' motion to dismiss amended complaint. (Doc. #21). Defendants filed a motion to strike the opposition (doc. #21) pursuant to Local Rule 7-2. (Doc. #24). Plaintiffs filed an opposition (doc. #25), and defendants filed a reply (doc. #28).

Also before the court is plaintiffs' motion for summary judgment. (Doc. #17). Defendants filed an opposition (doc. #22), and plaintiffs filed a reply (doc. #26). Plaintiffs filed a preliminary

1 injunction on April 25, 2011 (doc. #32), defendants filed an opposition (doc. #36), and plaintiffs
2 filed a reply (doc. #38).

3 **Relevant Facts/Procedural History**

4 Plaintiffs filed their complaint (doc. #1-1) on October 13, 2010, against defendants for
5 allegedly inducing them to enter into their loan and/or failing to properly explain their rights under
6 the loan. After removing the action to this court (doc. #1), defendants filed their motion to dismiss
7 (doc. #4) on November 16, 2010. Plaintiff filed an amended complaint (doc. #8) on November 22,
8 2010, and an opposition to the motion on December 1, 2010 (doc. #11). Additionally, plaintiff filed
9 a response (doc. #12) to the Klingele minute order (doc. #5), alleging that they were never served
10 with or given notice of the motion to dismiss (doc. #4). Subsequently, defendants filed a new motion
11 to dismiss (doc. #14) and properly served the plaintiffs.

12 Plaintiffs' amended complaint (doc. #8) contends that they borrowed \$123,900.00 from
13 Quicken Loans Inc. on April 4, 2003, to purchase the property located at 5620 Scenic Pointe Avenue,
14 Las Vegas, Nevada 89130. The loan was then secured by a deed of trust on the property, wherein
15 Mortgage Electronic Registration Systems acted as the nominee and the nominal beneficiary for
16 Quicken. (Doc. #14). Orange Coast Title Company was named as the trustee, and BAC Home Loans
17 Servicing services the loan. *Id.* Plaintiffs are not current on their loan payments. As of the date of
18 the motion to dismiss (doc. #14), it has not been foreclosed upon.

19 The amended complaint (doc. #8) asserts claims for relief for (1) securitization of the loans,
20 (2) fraud in the inducement, (3) violations of the Truth In Lending Act, (4) failure to settle the loan
21 and/or accept alleged tender of payment for the loan, (5) breach of fiduciary duty, (6) failure to
22 produce the "original, unaltered, (wet ink signature)" promissory note, and (7) counterfeit securities.

23 **Motion To Dismiss (doc. #14)**

24 Defendants contend that the amended complaint (doc. #8) should be dismissed because
25 plaintiffs' claims either improperly lump all defendants together, are barred by the statute of
26 limitations, are meritless, or fail to state a claim upon which relief can be granted.

27 Under Federal Rule of Civil Procedure 12(b)(6), dismissal is proper when a complaint fails
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1 to state a claim upon which relief can be granted. Dismissal may be based on the lack of a cognizable
 2 legal theory or on the absence of sufficient facts alleged under a cognizable legal theory. *Navarro*
 3 *v. Block*, 250 F.3d 729, 732 (9th Cir. 2001); *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699
 4 (9th Cir. 1988). In order for the plaintiffs to survive a 12(b)(6) motion, they must “provide the
 5 grounds for [] entitlement to relief [which] requires more than labels and conclusions. *Twombly*, 550
 6 U.S. 544, 547. Further, rule 8 prohibits lumping all defendants together in a complaint without
 7 distinguishing between them or specifying which defendant is targeted by which allegation. Fed. R.
 8 Civ. P. 8; *See e.g. Gen-Probe, Inc. v. Amoco Corp.*, 926 F. Supp. 948, 960 (S.D. Cal. 1996); *Gauvin*
 9 *v. Trombatore*, 682 F. Supp. 1067, 1071 (N.D. Cal. 1988) (lumping defendants together fails to
 10 satisfy rule 8 notice provisions.)

11 As a preliminary matter, it is not clear from the amended complaint (doc. #8) which
 12 defendant is to have allegedly done which actions. Plaintiffs merely state that *defendants* committed
 13 the alleged wrongful actions, but fail to distinguish between the defendants and their actions.
 14 Dismissal is proper on these grounds. However, the court is inclined to address the additional
 15 grounds for dismissal which cannot be cured by amending the pleading. *Id.*

16 **A. Claim One - Securitization Of The Loan**

17 In the plaintiffs’ first claim, they assert that the “bank loaned money to [plaintiffs] to buy [the
 18 property], but later was paid in full when it sold the loan involved to others.” (Doc. #8). Further, they
 19 contend that the “original promissory note was illegal[ly] converted (from a note to a draft and
 20 security) and sold by [the defendants]... to other buyers of notes an undisclosed number of times, at
 21 a discount.” *Id.* This claim is based on a theory that securitization of a loan somehow diminishes the
 22 underlying power of sale that can be exercised upon a trustor’s breach. This theory has been
 23 rejected as “unsupported and incorrect.” *Hafiz v. Greenpoint Mortgage Funding, Inc.*, 652 F.Supp.2d
 24 1039, 1043 (N.D.Cal. 2009); *Benham v. Aurora Loan Services LLC*, No. C-09-2059 SC, 2009 WL
 25 2880232, at *3 (N.D.Cal. Sept. 1, 2009) (same); *see also Ritter v. Countrywide Home Loans, Inc.*,
 26 No. 2:10-cv-624, 2010 WL 2342535, at *1-2 (D.Nev. June 4, 2010) (argument that plaintiffs did not
 27 know owner of loan due to securitization did not entitle plaintiffs to a temporary restraining order).

1 Therefore, plaintiffs' first claim involving the securitization of the loan must fail. *Id.*

2 **B. Claim Two - Fraud In The Inducement**

3 Plaintiffs appear to be claiming that defendants wrongfully induced them to enter into an
4 agreement for the loan. Plaintiffs do not allege facts stating that any defendant owed them a duty to
5 make disclosures about risks relating to the loan, since such allegations would be impossible against
6 defendants, such as these, as they were not involved in the origination of the loan. Even if the
7 defendants were involved in the origination of the loan in some manner, the claim fails because it
8 does not meet the requisite pleading standard under rule 9(b). Fed. R. Civ. P. 9(b). Under this rule,
9 a plaintiff must "specify the misrepresentations [and] explain in what way they were false." *Arroyo*
10 *v. Wheat*, 591 F. Supp. 141, 144 (D. Nev. 1984).

11 Here, plaintiffs do not provide the court with any detail as to the "time, place, and specific
12 content of the false representations," and only make a generic allegation that the defendants acted
13 fraudulently. *Schreiber Distributing Co. v. Serv-Well Furniture Co., Inc.*, 806 F.2d 1393, 1401 (9th
14 Cir. 1986). Therefore, dismissal is proper. *Id.* Furthermore, any amendment could not save this
15 claim, because, as it relates to actions in 2003, it is barred by the three-year statute of limitations. *See*
16 N.R.S. § 11.190(3)(d).

17 **C. Claim Three - Violations of the Truth In Lending Act**

18 Under the Truth In Lending Act, creditors are required to disclose to borrowers the terms and
19 conditions of the loans, such as the amount financed, the finance charges, the number of payments
20 scheduled to repay the loan, as well as the borrower's right to rescind the loan. 15 U.S.C. §§ 1635(a)
21 & 1638(a); *Castrillo v. American Home Mortgage Servicing, Inc.*, 670 F.Supp.2d 516, 527 (E.D.La.
22 2009). Here, plaintiffs assert two claims under this act; (1) a rescission claim based on the allegation
23 that defendants "failed to provide an opportunity to cancel" the loan, and (2) a damages claim based
24 on the violations. (Doc. #8).

25 As none of the defendants are the lender, the plaintiffs cannot claim that they acted or failed
26 to act in any manner to violated the Truth In Lending Act. Additionally, since the loan was originated
27 in 2003, any claim under the Truth In Lending Act is barred by the one-year statute of limitations for
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1 damages and the three-year statute of limitations for rescission claims. *See* 15 U.S.C. § 1640(e)
 2 (“any action under this section may be brought in any United States district court ... within one year
 3 from the date of the occurrence of the violation”); *See* 15 U.S.C. § 1635(f) (The right of rescission
 4 pursuant to the Truth In Lending Act “shall expire three years after the date of consummation of the
 5 transaction or upon the sale of the property, whichever occurs first ...”). Therefore, claim three is
 6 dismissed.

7 **D. Claim Four- Failure to Accept Tender/Settle Loan**

8 The fourth claim relates to plaintiff’s demands on defendants to provide certain documents.
 9 According to the defendants, they informed the plaintiffs of the amount due to bring the loan current,
 10 and plaintiffs responded by sending a cover letter with documents purporting to pay off their loan
 11 on June 28, 2010. (Doc. #14). In the letter, plaintiffs asserted that defendants were required to
 12 produce the “wet ink signature note” and that failure to do so would result in the release of
 13 defendants’ claim to the amount owed on the loan. (Doc. #14). Further, the plaintiffs contended in
 14 a follow-up letter that “legal tender fund in the amount of \$111,278.23 [will be] paid to
 15 LENDER/AGENTS upon production of the original (wet ink signature) promissory note held by
 16 [defendants] as collateral.” *Id.*

17 Contrary to plaintiffs’ demands for a verification of a debt, the “debt collector [need only]
 18 confirm in writing the amount being demanded is what the creditor is claiming is owed.” *Clark v.*
 19 *Capital Credit & Collection Services, Inc.*, 460 F.3d 1162 (9th Cir. 2006) (quoting *Chaudhry v.*
 20 *Gallerizzo*, 174 F.3d 394, 406 (4th Cir. 1999)). This requirement was clearly met by the defendants.
 21 However, the plaintiffs’ purported “pay-off,” without any evidence of actual payment, does not
 22 constitute a satisfaction of the loan nor support their fourth claim. *See Dinsmore-Thomas v.*
 23 *Ameriprise Financial, Inc.*, 2009 WL 2431917, 6 (C.D.Cal.) (C.D.Cal., 2009) (Court held that it
 24 “[could] not see how or why [d]efendant should have relied on [p]laintiff’s bare assertion” that a
 25 purported money order made payable to the IRS and submitted to the servicer, constituted a full
 26 payoff of her loan). Therefore, this claim fails.

E. Claim Five - Breach Of Fiduciary Duty

Plaintiffs contend that defendants “accepted” an appointment as fiduciary in their June 28, 2010, letter by asserting that the defendants “agree to be appointed fiduciaries with the mandatory duty to settle the claim upon my tender of payment to the escrow agent...” (Doc. #14). However, plaintiffs imposition of this duty, unilaterally, does not create a duty where none exists. It is well settled that “a financial institution does not owe a duty of care to a borrower when the lender’s involvement in the loan transaction does not exceed the scope of its conventional role as lender of money.” *Velasquez v. HSBC Mortg. Serv.*, 2009 WL 2338852, *5 (D. Nev. July 24, 2009). Additionally, “the lender is under no duty to ensure the success of the borrower’s investment.” *Id.* Finally, “courts have repeatedly held that a lender owes no fiduciary duty to a borrower absent exceptional circumstances, such as when a special relationship exists between the two parties.” *Larson v. Homecomings Fin., LLC*, 680 F. Supp. 2d 1230, 1234 (D. Nev. 2004).

Absent any showing of “exceptional circumstances” or a “special relationship,” the court is inclined to dismiss plaintiff’s fifth claim. *Id.*

F. Claim Six - Failure to Produce Note

In the amended complaint (doc. #8), the plaintiffs assert that defendants have no claim to the payments on the loan because they have failed to produce the original note. However, this claim fails because there is no such duty imposed on the defendants and such production is not necessary to enforce the terms of the loan. *See Dinsmore-Thomas v. Ameriprise Financial, Inc.*, 2009 WL 2431917, 6, 4 (C.D.Cal., 2009); *See Joyner v. Bank of Am. Home Loans*, No. 2:09-cv-2406-RCJ-RJJ, at 8 (D.Nev. July 26, 2009); *Aguilar v. WMC Mortgage Corp.*, 2:09-cv-1416-ECR-PAL, 2010 WL 185951, at *2 (D.Nev. Jan. 15, 2010). Thus, dismissal of claim six is proper.

G. Claim Seven - Counterfeit Securities

Plaintiffs allege in their seventh claim that the loan is a “[c]ounterfeit [s]ecurity in that [d]efendants deceived and defrauded” plaintiffs in violation of 18 U.S.C. § 513. However, this statute is a federal criminal statute and does not provide for a private right of action. *Florence v. Buchmeyer*, 500 F.Supp.2d 618, 635 (N.D.Tex. 2007) (“a private party may not enforce criminal

1 statutes through a civil action.”). Therefore, the seventh claim is dismissed.

2 **Motion To Strike (doc. #24)**

3 In defendants’ motion to strike (doc. #24), they ask this court to strike the plaintiffs’
4 supplemental opposition to defendants’ reply in support of their motion to dismiss (doc. #21). After
5 the defendants’ motion to dismiss (doc. #14) was fully briefed, the plaintiffs filed a supplemental
6 opposition (doc. #21) without leave of the court. Not only was this pleading improperly filed without
7 leave, but it also fails to provide the court with any newly discovered facts or law that would warrant
8 filing a supplement.

9 Defendants assert, and this court agrees, that striking the opposition (doc. #21) is appropriate
10 under Local Rule 7-2. The court will not consider this supplemental opposition, and it will be
11 stricken accordingly.

12 **Motion for Summary Judgment/Preliminary Injunction and Sanctions (doc. #17, #32 and #33)**

13 Plaintiffs claim that summary judgment is appropriate in their favor because “[d]efendants
14 are not in standing with the [c]ourt” and “cannot show ownership of the alleged [m]ortgage [l]oan.”
15 (Doc. #17). Further, they contend that a preliminary injunction should be granted “to prevent
16 threatened wrong, further injury, and irreparable harm or injustice until such time as the rights of the
17 parties can be ultimately settled,” and that sanctions are appropriate. (Doc. #32).

18 In light of the court above ruling dismissing the complaint (doc. #14), the present motions
19 for summary judgment, preliminary injunction, and sanctions are moot.

20 **Motion To Amend/Correct to Join Defendant (doc. #34)**

21 On April 25, 2011, plaintiffs filed the present motion (doc. #34) asking the court to allow
22 them to “join” Recon Trust Company as a defendant in the case. They assert that this is necessary
23 because Recon “now claims possession of the deed of trust and all documents evidencing obligations
24 secured thereby,” as it filed a default and election to sell real property which is the subject of the
25 complaint. (Doc. #34).

26 Any motion for leave to amend was to be filed by February 15, 2011. Further, the plaintiffs
27 failed to attach a copy of their proposed amended complaint pursuant to Local Rule 15-1. Therefore,
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1 this untimely and improper request to amend the complaint is denied.

2 Accordingly,

3 IT IS HEREBY ORDERED ADJUDGED AND DECREED that defendants Bank of
4 America Loans Servicing, LP, Bank of America Home Loans, Bank of America NA, and Mortgage
5 Electronic Registration Systems' motion to dismiss (doc. #4) be, and the same hereby is DENIED
6 as moot.

7 IT IS FURTHER ORDERED that defendants' motion to dismiss plaintiffs' amended
8 complaint (doc. #14) be, and the same hereby is, GRANTED. Plaintiff's amended complaint (doc.
9 #8) is hereby DISMISSED without prejudice.

10 IT IS FURTHER ORDERED that defendants' motion to strike (doc. #24) plaintiffs'
11 supplemental opposition (doc. #21) be, and the same hereby is GRANTED. Plaintiffs' opposition
12 (doc. #21) is hereby STRICKEN.

13 IT IS FURTHER ORDERED that plaintiffs' motions for summary judgment (doc. #17),
14 preliminary injunction (doc. #32) and sanctions (doc. #33), be and the same hereby are, DENIED
15 as moot.

16 IT IS FURTHER ORDERED that plaintiffs' motion to amend (doc. #34) be, and the same
17 hereby is, DENIED.

18 DATED June 22, 2011.

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21 UNITED STATES DISTRICT JUDGE